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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

8 ALEKSANDRA S. VELICHKO )

9 Plaintiff, )

10 v. )

11 JO ANNE B. BARNHART, )  
Commissioner of Social Security, )

12 Defendant. )  
13 )

CASE NO. C05-0740-RSL

REPORT AND  
RECOMMENDATION

14 Plaintiff Aleksandra S. Velichko appeals to the District Court from a final decision of the  
15 Commissioner of the Social Security Administration (the “Commissioner”) denying her  
16 application for Supplemental Security Income disability benefits under Title XVI of the Social  
17 Security Act. For the reasons set forth below, it is recommended that the Commissioner’s  
18 decision be AFFIRMED.

19 I. PROCEDURAL HISTORY

20 Plaintiff applied for Supplemental Security Income (“SSI”) on August 20, 2001, with a  
21 protective filing date of August 6, 2001. In her application, she claimed that she had been  
22 disabled since January 1952 (Tr. 98) with heart problems and pain in her lower back and both  
23 legs. She also claimed that she had been unable to work since 1954 or 1955. (*Id.*) The Social  
24 Security Administration denied Plaintiff’s application initially (Tr. 57–58) and upon

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1 reconsideration. (Tr. 59.) A hearing was held before Administrative Law Judge (“ALJ”) Edward  
2 P. Nichols, on October 30, 2003. Plaintiff, who was represented by counsel, and her niece, Galina  
3 Bozhko, testified at the hearing. (Tr. 29–56.) A Ukrainian/English interpreter provided  
4 assistance during the hearing. (Tr. 29.) The ALJ issued an unfavorable decision on February 13,  
5 2004, finding that Plaintiff did not have “pain [or] other functional limitations so severe as to  
6 preclude even sedentary, unskilled work activity” (Tr. 27) and that because she could perform  
7 such work, she was not under a disability “at any time through the date of the decision.” (Tr. 28.)  
8 On February 18, 2005, the Appeals Council denied Plaintiff’s request for review, making the  
9 ALJ’s decision the final decision of the Commissioner. (Tr. (6–8).) Plaintiff timely filed her  
10 appeal with this Court on April 19, 2005.

## 11 II. THE PARTIES’ POSITIONS

12 Plaintiff requests that the Court reverse the Commissioner’s decision and remand for  
13 payment of benefits. Plaintiff argues that the ALJ erred in: (1) finding that Plaintiff’s employment  
14 when she was still in the Ukraine was full-time work and therefore constituted “past relevant  
15 work”; (2) otherwise misstating the factual evidence; (3) improperly assessing Plaintiff’s  
16 credibility; (4) improperly rejecting Ms. Bozhko’s testimony; and (5) improperly rejecting the  
17 evidence supplied by Plaintiff’s treating physicians.

18 Defendant responds that the Commissioner’s decision should be affirmed because it is  
19 supported by substantial evidence and is free of legal error.

## 20 III. STANDARD OF REVIEW

21 This Court may set aside the Commissioner’s denial of social security disability benefits  
22 when the ALJ’s findings are based on legal error or are not supported by substantial evidence.  
23 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9<sup>th</sup> Cir. 1989). Substantial evidence means more than a  
24 scintilla, but less than a preponderance; it is such relevant evidence as a reasonable mind might

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1 accept as adequate to support a conclusion. *Id.* To determine whether substantial evidence  
2 supports the ALJ's decision, we must consider the evidence as a whole, weighing both evidence  
3 that supports, and evidence that detracts from the ALJ's conclusion. *Id.* The ALJ is responsible  
4 for determining credibility, resolving conflicts in the testimony, and resolving ambiguities. *Id.*  
5 Where evidence is susceptible of more than one rational interpretation, it is the ALJ's decision  
6 that must be upheld). *Id.*

#### 7 IV. EVALUATING DISABILITY

8 The claimant bears the burden of proving that she is disabled. *Meanel v. Apfel*, 172 F.3d  
9 1111, 1113 (9<sup>th</sup> Cir. 1999). Disability is defined as the inability to engage in any substantial  
10 gainful activity by reason of any medically determinable physical or mental impairment which can  
11 be expected to result in death or which has lasted, or can be expected to last, for a continuous  
12 period of not less than 12 months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A).

13 The Social Security regulations set forth a five-step sequential evaluation process for  
14 determining whether a claimant is disabled under the Social Security Act. *Bowen v. Yuckert*, 482  
15 U.S. 137, 140 (1987); 20 C.F.R § 416.920. At step one, the claimant must establish that he is not  
16 engaging in any substantial gainful activity. *Id.* At step two, the claimant must demonstrate that  
17 he has one or more severe impairments. *Id.* At step three, the Commissioner will determine  
18 whether the claimant's impairment meets or equals any of the listed impairments described in the  
19 regulations. *Id.* At step four, if the claimant's impairment(s) neither meets nor equals one of the  
20 listed impairments, the Commissioner will then evaluate the claimant's residual functional capacity  
21 and past relevant work. If claimant is not able to perform his past relevant work, the burden shifts  
22 to the Commissioner at step five to identify jobs existing in significant numbers in the national  
23 economy that the claimant can perform given her residual functional capacity, age, education, and  
24 work experience. *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9<sup>th</sup> Cir. 1999). If a claimant is

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1 determined to be disabled at any stage of the process, there is no need to consider subsequent  
2 steps. *Id.* at 1099.

3 V. SUMMARY OF THE RECORD EVIDENCE AND OF THE ALJ'S FINDINGS

4 Plaintiff, who was born on or about August 19, 1949 (Tr. 21), was 52 years old when she  
5 applied for benefits in August 2001 and was 54 years old at the time the ALJ issued the decision.  
6 She received the Ukrainian equivalent of a GED in 1966. (Tr. 104.) She emigrated to the United  
7 States as a refugee in February 2001. (Tr. 21.) Although she has never worked since arriving in  
8 the United States, she worked as a clerk for 25 years. This employment ceased in 1992, for  
9 reasons not clear from the record.<sup>1</sup>

10 A. *Plaintiff's application and testimony*

11 In her application, Plaintiff indicated that her heart problems and the pain in her legs and  
12 back render her unable to "move or do any kind of action without feeling pain." (Tr. 98.) While  
13 she has had physical problems since she was a child (Tr. 105 (stating that she started having  
14 palpitations as a child)), now she is unable to walk or sit for a long time and even sleeping causes  
15 her pain (*id.*). She also feels pain in her stomach and "under [her] chest". (*Id.*) "My left leg is  
16 shorter than right leg. There is greater load work action on my right leg. In 2000 I lost  
17 consci[ousness] for 1.5 hour [sic]." (*Id.*)

18 At the hearing, Plaintiff was hard-pressed to speak in an audible voice because she was  
19 feeling chest pain and weakness. (Tr. 34.) She testified that she frequently felt pain at a level that  
20 made it difficult for her to speak out and for which she rested on the couch. (*Id.*)

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22 <sup>1</sup>In her SSI application, Plaintiff stated that "I was discharged because of my health  
23 condition." (Tr. 98.) However, Dr. Marty Hoiness, M.D., who performed a consultative  
24 psychiatric evaluation of Plaintiff on November 10, 2001, recorded in his notes that Plaintiff told  
25 him that she had "quit working in 1992 because the organization she worked for shut down." (Tr.  
26 167.)

1 With respect to her employment in the Ukraine, Plaintiff stated that she was “frequently  
2 picked up by the emergency medical team” (Tr. 35) and that she “had times where [she] only  
3 worked for 35 days out of the year and the rest of it was hospitalized.” (Tr. 36.) She also stated,  
4 however, that “when I was working I was working about six hours. Sometimes it would last  
5 longer, maybe seven, but that was rare,” and that during these periods of time when she worked  
6 relatively full days, she worked five days a week. (Tr. 36.) She testified that her biggest  
7 problems were heart and psychological (“memory loss, could not relax, agitated”) problems. (Tr.  
8 38.) In response to her attorney’s questioning, Plaintiff said that she had sometimes missed work  
9 because of the psychological problems.

10 To give the ALJ a better sense of how much Plaintiff worked, her attorney elicited  
11 testimony about her ability to earn a livelihood. Plaintiff testified that her job, which paid her 75  
12 rubles, had been her sole means of support but that her brothers had also helped her by giving her  
13 food and money. (Tr. 37.)

14 Regarding her current state, Plaintiff testified that she never goes shopping by herself,  
15 does not drive or take the bus, and is somewhat isolated from people other than family members.  
16 However, with respect to family members, she testified that she received visits from a 71-year-old  
17 brother almost every day (Tr. 43), and from Galina Bozhko “[s]ometimes twice a week.” (Tr. 44.)  
18 She also receives visits from other nieces and nephews. She also stated that without help from  
19 her family members, she would be unable to prepare food or do household chores like laundry.  
20 (Tr. 44.)

21 Finally, regarding her current inability to work, Plaintiff testified that if she were in the  
22 Ukraine now, she would not be working because she is of retirement age. She also explained that  
23 even if retirement was not a possibility, she could not now perform her past job because she is  
24 forgetful and unable to speak (“I forget — when I’m wanting to say something, I immediately  
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1 forget what it is I need to say.”) (Tr. 45.)

2 *B. Testimony of Galina Bozhko*

3 Galina Bozhko’s mother and Plaintiff are cousins. (Tr. 46.) Ms. Bozhko testified that she  
4 calls Plaintiff every day and that she tries to visit every other day and sometimes every day or even  
5 more “because it depends on how she’s feeling.” (Tr. 47.) However, when asked why Plaintiff  
6 would have said that she only sees Ms. Bozhko twice a week, Ms. Bozhko confirmed that  
7 Plaintiff could have trouble remembering her visits because of her general forgetfulness. She  
8 noted that Plaintiff forgets simple things like meals and medicines. (Tr. 47.)

9 Ms. Bozhko testified that on different kinds of occasions when she would try to engage  
10 her aunt (*i.e.*, asking her why she hadn’t yet gotten out of bed, or inviting her to walk to the  
11 school to pick up Ms. Bozhko’s son), Plaintiff would complain of being tired and feeling “heart  
12 stops.” (Tr. 48.)

13 In these and other points, Ms. Bozhko’s testimony largely corresponded to and confirmed  
14 Plaintiff’s testimony.

15 *C. Medical sources<sup>2</sup>*

16 *1. Dr. Denis Short*

17 Plaintiff began to see Dr. Short for psychiatric treatment in April 2002. The record  
18 contains treatment notes from Dr. Short from April 2002 through October 2004, as well as DSHS  
19 evaluation forms. She was assessed with major depression, a generalized anxiety disorder, and  
20 possible somatization disorder. (Tr. 23.) After receiving treatment and therapy from April 2002  
21 through July 9, 2002, she received medication renewals and evaluations every three months. (*Id.*)  
22 As the ALJ correctly noted, “[d]uring these evaluations, the claimant reported minimal

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24 <sup>2</sup>The Court discusses only those medical sources whose treatment by ALJ Nichols is  
25 challenged by Plaintiff.

1 improvement.” (*Id.*)

2 On a treatment note dated October 14, 2003, Dr. Short wrote something that looks like  
3 “Write this summary for her Legal assistant in obtaining SSI.” (Tr. 389.) Due to the natural  
4 imperfections inherent in handwriting, the word represented above as “assistant” could also have  
5 read “assistanc”.

6 In the DSHS evaluation forms, completed on March 9, 2004 (Tr. 393–96), and May 3,  
7 2004 (Tr. 402–07), Dr. Short assessed Plaintiff’s cognitive abilities as markedly or severely  
8 impaired, and her social abilities as ranging from reflecting no impairment to being severely  
9 impaired. More specifically, Plaintiff’s “[a]bility to relate appropriately to co-workers and  
10 supervisors” was assessed as markedly impaired (Tr. 395), and her “[a]bility to respond  
11 appropriately to and tolerate the pressure and expectations of a normal work setting” was  
12 severely impaired (*id.*). However, Plaintiff’s “[a]bility to control physical or motor movements  
13 and maintain appropriate behavior” was unimpaired (*id.*), her “[a]bility to interact appropriately in  
14 public contacts” was mildly impaired (*id.*), and her “[a]bility to care for self, including personal  
15 hygiene and appearance” was mildly impaired (*id.*). In the May evaluation, this last was judged to  
16 be moderately impaired, a step up from “mild” impairment (*id.* at 404). Overall, Dr. Short  
17 estimated that Plaintiff could suffer from this level of impairment for the rest of her life. (Tr. 396,  
18 405.)

19 2. *Dr. Richard Washburn*

20 The record contains a DSHS evaluation form completed by Dr. Richard Washburn and  
21 dated January 2002. (Tr. 171–75.) In this form, Dr. Washburn noted that Plaintiff had “poor  
22 delayed memory, poor auditory and visual concentration, poor abstract reasoning, and poor  
23 practical judgment.” (Tr. 173.) In explaining that “mental health intervention [would not be]  
24 likely to restore or substantially improve [Plaintiff’s] ability to work for pay in a regular and  
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1 predictable manner,” Dr. Washburn wrote that “client has limited work [history], no English,  
2 chronic depression, many complaints of poor health, needs SSI.” (Tr. 174.) He recommended  
3 medication and a counselor “able to speak her language” and wrote “Refer for SSI.” (*Id.*)

4 *D. The ALJ’s findings*

5 At step one, ALJ Nichols found that Plaintiff had not engaged in substantial gainful  
6 activity since August 6, 2001. (Tr. 27.) At step two, he found that Plaintiff had been diagnosed  
7 with depression and a somatization disorder and that the combination of these impairments was  
8 severe. (*Id.*) At step three, he found that her impairments did not meet or medically equal the  
9 requirements of any listed impairments. (*Id.*)

10 At step four, after considering and discounting some of the evidence, most notably some  
11 of Plaintiff’s testimony, Ms. Bozhko’s testimony, and data from Drs. Short and Washburn, ALJ  
12 Nichols found that Plaintiff had the residual functional capacity to perform the exertional and  
13 nonexertional requirements of at least sedentary unskilled work activity, including her past  
14 relevant work. In making this finding, ALJ Nichols determined that “even when giving the benefit  
15 of the doubt to the claimant and crediting some of her physical complaints, the evidence supports  
16 a finding that the claimant should be able to perform the physical requirements of at least  
17 sedentary work activity.” (Tr. 26.) The evidence cited by the ALJ supporting this finding  
18 included: (1) Dr. Biermann’s assessment that Plaintiff would be able to perform sedentary work,  
19 but also noting that bursitis in her right hip affected her ability to ambulate and to sit for long  
20 periods of time (Tr. 345); and (2) Dr. Hoiness’s assessment that she would be able to perform  
21 simple and repetitive tasks, but not manage funds or interact with people (Tr. 343). The ALJ  
22 acknowledged that Plaintiff had been diagnosed with a depressive disorder, but noted that this  
23 disorder “imposes nonexertional limitations on her residual functional capacity.” (Tr. 26.)

24 Having found that Plaintiff possessed residual functional capacity to perform unskilled



1 sedentary work, the ALJ went on to find that Plaintiff's past work as a clerk in the Ukraine  
2 constituted past relevant work, noting that Plaintiff had testified that her work activity had been  
3 enough to support her financially and that Plaintiff had reported having worked full time. (Tr.  
4 27.)

5 Because ALJ Nichols found that Plaintiff had sufficient residual functional capacity to  
6 perform her past relevant work, characterized as unskilled sedentary or less than sedentary work  
7 (Tr. 26), the ALJ's analysis ended at step four.

## 8 VI. ANALYSIS

9 This analysis will first review ALJ Nichols's rejection or discounting of certain evidence  
10 for legal error, then proceed to determine whether his findings were supported by substantial  
11 evidence.

### 12 A. *Physicians' opinions*

13 Plaintiff argues that the ALJ erred by mischaracterizing and disregarding the medical data  
14 and assessments provided by Drs. Short and Washburn. Dr. Short was Plaintiff's treating  
15 psychiatrist. Dr. Washburn performed a DSHS evaluation.

#### 16 I. *Dr. Short*

17 The Commissioner must provide "clear and convincing reasons" for rejecting the  
18 uncontradicted opinion of an examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.  
19 1996) (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1999)). The opinion of an examining  
20 doctor, even if contradicted by another doctor, can only be rejected for specific and  
21 legitimate reasons that are supported by substantial evidence in the record. *Lester*, 81 F.3d at  
22 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995)).

23 An ALJ is responsible for assessing the credibility of and resolving ambiguities and  
24 conflicts in the medical evidence. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9<sup>th</sup> Cir. 1992).

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1 “The ALJ need not accept an opinion of a physician – even a treating physician – if it is  
2 conclusionary and brief and is unsupported by clinical findings.” *Id.* (citing *Magallanes*, 881  
3 F.2d at 751). “Where medical reports are inconclusive, questions of credibility and resolution of  
4 conflicts in the testimony are functions solely of the Secretary.” *Magallanes*, 881 F.2d at 751.

5 In the present case, Dr. Short’s records are riddled with inconsistencies and minor errors  
6 that complicate the analysis. First, Dr. Short’s records contain many misspellings or illegibly-  
7 written words that require a reader to guess at the correct word. One such critical word played a  
8 role in leading ALJ Nichols to conclude that Dr. Short’s records had been biased in favor of  
9 helping Plaintiff obtain SSI aid.

10 However, even if ALJ Nichols erred in his reading of this particular word, he also noted  
11 that Plaintiff had reported to Dr. Biermann that her psychiatric treatment was going well and Dr.  
12 Biermann herself had observed that Plaintiff’s depression was stable. (Tr. 302.) More  
13 importantly, Dr. Short’s own records contain no clinical findings tending to support Plaintiff’s  
14 complaints of physical pain. Indeed, Dr. Short’s treatment notes and evaluations both note that  
15 Plaintiff has had a lifetime of being treated as an invalid (Tr. 388, 395, 396), has “ingrained  
16 expectations that she will continued [*sic*] to be cared for” (Tr. 395), and “has lifetime of living  
17 [illegible] learned helplessness. She has no special incentive to change this pattern of existence.”  
18 (Tr. 404.)

19 Given these comments in Dr. Short’s own notes supporting ALJ Nichols’s observation  
20 that Plaintiff is not highly motivated to work, ALJ Nichols’s decision to discount Dr. Short’s  
21 ultimate conclusions regarding Plaintiff’s ability (or lack thereof) to work with other people is  
22 supported by specific and legitimate reasons that are themselves supported by substantial evidence  
23 in the record. In addition, the presence of such notes and observations is in stark contrast to the  
24 absence of clinical findings supporting Dr. Short’s conclusion that Plaintiff was possibly precluded

1 from ever returning to work. Accordingly, I conclude that ALJ Nichols was not required to  
2 accept Dr. Short's conclusionary opinions as they were unsupported by clinical findings.

3                   2.       *Dr. Washburn*

4           Plaintiff argues that ALJ Nichols improperly disregarded Dr. Washburn's assessment.  
5 However, it is uncontested that Dr. Washburn's assessment, written on a DSHS evaluation form,  
6 and containing lengthy handwritten notes often exceeding the space allotted, was based neither on  
7 mental status examinations nor on psychological testing. It is also undisputed that Dr. Washburn  
8 based his assessment on Plaintiff's subjective complaints. Thus, because Dr. Washburn's opinion  
9 was based only on Plaintiff's subjective complaints and was not supported by any clinical findings,  
10 ALJ Nichols's rejection of the finding that Plaintiff was unable to work was proper. *Matney*, 981  
11 F.3d at 1019; *Thomas v. Barnhart*, 278 F.3d 947, 957 (9<sup>th</sup> Cir. 2002).

12           *B.       Plaintiff's testimony*

13           Plaintiff argues that ALJ Nichols erred in dismissing the credibility of her testimony.

14           In assessing a claimant's subjective symptom testimony, an ALJ applies a two-step test.  
15 First, the ALJ must determine whether the claimant has produced objective medical evidence of  
16 an underlying impairment that could reasonably be expected to produce some degree of  
17 symptom. *Smolen v. Chater*, 80 F.3d 173, 1281 (9<sup>th</sup> Cir. 1996). Second, if such evidence has  
18 been produced, and if there is no "affirmative evidence" of malingering, an ALJ "may reject the  
19 claimant's testimony regarding the severity of her symptoms only if [s]he makes specific  
20 findings stating clear and convincing reasons for doing so." *Id.* at 1284.

21           In the present case, ALJ Nichols accepted that Plaintiff suffers from depression and a  
22 somatization disorder. However, ALJ Nichols found that "the objective medical evidence does  
23 not show any evidence of physical impairments that could be responsible for the claimant's alleged  
24 pain complaints." (Tr. 25.) This was incorrect. The correct inquiry is whether, once Plaintiff

1 produced evidence of an underlying impairment, that impairment could reasonably be expected to  
2 produce some degree of symptom. Thus, the question is whether Plaintiff's depression and  
3 somatization disorder (acknowledged by ALJ Nichols to exist) could produce some degree of the  
4 pain complained of by Plaintiff. ALJ Nichols answered this question in the affirmative himself,  
5 stating that "I conclude that the claimant has been diagnosed with depression and a *somatization*  
6 *disorder causing numerous physical complaints.*" (Tr. 25 (emphasis added).) Accordingly, the  
7 first prong of the *Smolen* test is satisfied.

8 The second prong of the *Smolen* test inquires whether there is affirmative evidence of  
9 malingering. In the present case, ALJ Nichols remarked that Plaintiff showed herself "less than  
10 motivated to work, considering herself at age 54 to be of 'retirement age.'" (Tr. 26.)<sup>3</sup> Although  
11 Plaintiff argues that the ALJ's perception of her unwillingness to work is the product of imperfect  
12 translation of her testimony, the ALJ's perception is supported by evidence in the record, most  
13 notably Dr. Short's repeated observations that Plaintiff "has lifetime of living [illegible] learned  
14 helplessness. She has no special incentive to change this pattern of existence." (Tr. 404.) Thus,  
15 there appears to be affirmative evidence of malingering tending to discredit Plaintiff's subjective  
16 pain testimony.

17 Even if there was no affirmative evidence of malingering, ALJ Nichols adequately  
18 explained his reasons for refusing to fully credit Plaintiff's subjective pain testimony. In cases  
19 where there is no affirmative evidence of malingering, "[t]o find the claimant not credible the ALJ  
20 must rely either on reasons unrelated to the subjective testimony (*e.g.*, reputation for dishonesty),  
21 on conflicts between [her] testimony and [her] own conduct, or on internal contradictions in that  
22 testimony." *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9<sup>th</sup> Cir. 1997). The reasons  
23 enumerated by the ALJ "must be sufficiently specific to allow a reviewing court to conclude the

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24 <sup>3</sup>ALJ Nichols made a similar comment at Tr. 24.

1 [ALJ] rejected the claimant's testimony on permissible grounds and did not arbitrarily discredit  
2 [the] claimant's testimony." *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cir. 1991). The ALJ  
3 may consider, for example: 1) ordinary techniques of credibility evaluations, such as the  
4 claimant's reputation for lying and prior inconsistent statements concerning the symptoms; 2)  
5 unexplained or inadequately explained failure to seek treatment or to follow a prescribed course  
6 of treatment; 3) the claimant's daily activities; and 4) medical evidence tending to discount the  
7 severity of subjective claims. *Rollins v. Massanari*, 261 F.3d 853, 856-57 (9<sup>th</sup> Cir. 2001).

8 First, he noted that Plaintiff's testimony was inconsistent. (Tr. 24-25.) On the one hand,  
9 Plaintiff represented that she had been disabled since childhood, yet had managed to hold down a  
10 job in the Ukraine for many years. ALJ Nichols also noted that Plaintiff "has not been fully  
11 compliant with treatment recommendations and on several occasions did not take her medications  
12 as directed." (Tr. 25.) He also remarked that Plaintiff has only received treatment for her mental  
13 impairments through medications. (*Id.*)

14 In light of the inconsistencies in her testimony and her relatively limited efforts to improve  
15 her condition and seek thorough treatment, ALJ Nichols properly concluded on the basis of  
16 adequately clear and convincing reasons that Plaintiff's allegations regarding the severity of her  
17 impairments were not fully credible.<sup>4</sup> *See Flaten v. Sec'y of Health & Human Servs.*, 44 F.3d  
18 1453, 1463-64 (9<sup>th</sup> Cir. 1995). Accordingly, I find that the ALJ did not err in finding Plaintiff's

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20 <sup>4</sup>I note that although the foregoing reasons stated are sufficient to affirm ALJ Nichols's  
21 credibility determination, his finding that her reported activity levels contradict her allegations of  
22 the severity of her symptoms improperly penalizes Plaintiff "for attempting to lead [a] normal  
23 li[fe] in the face of [her] limitations." *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998). *See*  
24 *also Cooper v. Bowen*, 815 F.2d 557, 561 (9<sup>th</sup> Cir. 1987) (noting that a disability claimant need  
25 not "vegetate in a dark room" in order to be deemed eligible for benefits). In particular, ALJ  
Nichols cites "visiting with relatives" as one category of activity seeming to belie her allegations  
of impairment. While it is true that the record contains frequent mentions of Plaintiff's "visits"  
with her family, these "visits" appear not to be mere social visits, but visits intended to help  
maintain and sustain Plaintiff.

1 testimony not entirely credible.

2 C. *Testimony of Ms. Bozhko*

3 An ALJ must consider a lay witness's observations of how the claimant's impairment  
4 affects his or her ability to work. 20 C.F.R. § 404.1513(e)(2); *Smolen v. Chater*, 80 F.3d 1273,  
5 1288 (9th Cir. 1996). An ALJ may reject such testimony only if "reasons germane to each  
6 witness" are given. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993).

7 In the present case, Plaintiff argues that ALJ Nichols improperly discounted or  
8 disregarded Ms. Bozhko's testimony, which was similar to and bolstered Plaintiff's allegations of  
9 disability. Although Plaintiff characterizes the ALJ's treatment of Ms. Bozhko's testimony as a  
10 rejection (Pl.'s Reply 5), ALJ Nichols's written decision does no such thing. First, the decision  
11 recognized that Ms. Bozhko checks in on Plaintiff almost every day to help Plaintiff remember to  
12 pay her rent and take her medication. (Tr. 24.) Second, ALJ Nichols expressly noted that "I have  
13 carefully considered the testimony of the claimant and her witness with respect to the claimant's  
14 pain and functional limitations." (Tr. 26.) Having considered Plaintiff's and Ms. Bozhko's  
15 testimony, ALJ Nichols concluded that Plaintiff does indeed suffer from mental impairments, but  
16 that these impairments leave Plaintiff with the ability to perform the mental demands of unskilled  
17 work. This conclusion reflects the fact that much of Ms. Bozhko's testimony regarding Plaintiff's  
18 difficulties closely paralleled Plaintiff's complaints to her treating and examining physicians, who  
19 then took these factors into consideration when forming their opinions. ALJ Nichols's  
20 consideration of the medical opinions (incorporating and accounting for the factual  
21 representations of Plaintiff's day-to-day functioning) led him to conclude that Plaintiff was still  
22 able, despite her "depressive disorder that imposes nonexertional limitations on her residual  
23 functional capacity," to perform unskilled work. Accordingly, I conclude that ALJ Nichols's  
24 evaluation of Ms. Bozhko's testimony was proper.

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1           C.     *The ALJ's findings*

2                 1.     *Past relevant work*

3           Plaintiff argues that the ALJ erred in finding that Plaintiff's work as a "clerk assistant" in  
4 the Ukraine constituted "past relevant work." In particular, Plaintiff challenges the ALJ's finding  
5 that Plaintiff performed this job on a full-time basis, or, in the alternative, that the work otherwise  
6 qualified as substantial gainful activity.

7           ALJ Nichols's conclusion that Plaintiff's past work as a clerk assistant in the Ukraine  
8 needs only to be supported by substantial evidence — that is, more than a scintilla but less than a  
9 preponderance. *Magallanes v. Bowen*, 881 F.2d at 750. Here, Plaintiff herself supplied  
10 information supporting the conclusion that she performed this work on a full-time basis. Plaintiff  
11 testified that "when I was working I was working about six hours. Sometimes it would last  
12 longer, maybe seven, but that was rare," and that during these periods of time when she worked  
13 relatively full days, she worked five days a week. (Tr. 36.) Although Plaintiff also stated that  
14 there were periods when she only worked 35 hours in a year, the context of this statement  
15 strongly suggests that the 35-hour years were the exception rather than the rule. In addition to  
16 this hearing testimony, Plaintiff represented in her application for benefits that she had worked 8  
17 hours a day, 5 days a week from 1986 to 1992. These statements are sufficient to constitute  
18 "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."  
19 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Accordingly, I find that ALJ Nichols's finding  
20 that Plaintiff's past work was full-time was properly made.

21           In addition, Defendant correctly notes that "work may be substantial even if it is done on a  
22 part-time basis." *Byington v. Chater*, 76 F.3d 246, 250 (9<sup>th</sup> Cir. 1996) (quoting *Wright v.*  
23 *Sullivan*, 900 F.2d 675, 678 (3<sup>rd</sup> Cir. 1990)). Furthermore, "substantial gainful activity" includes  
24 the "kind of work usually done for pay or profit, whether or not a profit is realized." *Id.* at 248

1 (quoting 20 C.F.R. § 416.972(a)). Here, Plaintiff does not dispute that she earned wages.<sup>5</sup> Given  
2 the applicable inquiry and the particular facts of this case, I find that ALJ Nichols's conclusion  
3 that Plaintiff's past employment constitutes "past relevant work" is supported by substantial  
4 evidence in the record and must be affirmed.

5                   2.       *Plaintiff's residual functional capacity*

6       ALJ Nichols determined that Plaintiff would be able to perform at least sedentary unskilled  
7 work activity, including her past relevant work, which was characterized as "sub-sedentary".<sup>6</sup>  
8 ALJ Nichols found that although Plaintiff suffered some nonexertional limitations as a result of  
9 her depression, she "has the ability to make simple work decisions, respond appropriately to  
10 supervisors and co-workers, handle routine changes, and work on a sustained and continuous  
11 basis." (Tr. 26.) These findings are supported by substantial evidence in the record. As  
12 discussed above, ALJ Nichols properly discounted the conclusions formulated by Drs. Short and  
13 Washburn. Having discounted these conclusions, as well as Dr. Biermann's opinions  
14 (unchallenged by Plaintiff), ALJ Nichols was left with reports written by Dr. Marty Hoiness,  
15 M.D., Dr. Gerald Peterson, Ph.D., and Dr. Jeremy Nelson, Ph.D.

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17                   <sup>5</sup>Plaintiff contends only that the amount of wages she earned was so small, and that her  
18 family contributed so much to her upkeep, that she cannot be considered to have engaged in  
19 gainful activity.

20                   <sup>6</sup>Plaintiff notes in passing that a prior Social Security determination found that Plaintiff  
21 could not perform any of her past relevant work. (Pl.'s Opening Brief 2 (citing Tr. 137).)  
22 However, this previous determination characterized her past relevant work ("clerk") as "skilled"  
23 and found that her RFC was "light" and that her MRFC was "unskilled." (Tr. 137.) Thus, the  
24 prior finding that Plaintiff was unable to perform her past relevant work ("PRW") was due to the  
25 different characterization of her PRW. In contrast, ALJ Nichols's finding that Plaintiff's RFC is  
"sedentary" is, from Plaintiff's perspective, more generous than the previous finding. However,  
because ALJ Nichols also found that Plaintiff's PRW (involving labeling boxes with their weights)  
was sedentary or sub-sedentary, even an RFC of "sedentary" did not preclude Plaintiff from  
performing her PRW.

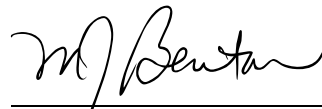


1 Dr. Hoiness, who evaluated Plaintiff, agreed that Plaintiff suffered from major depression,  
2 but opined (1) that Plaintiff would be “able to perform simple and repetitive tasks, but would have  
3 difficulty interacting with coworkers due to her lack of English” (Tr. 22); and (2) that most of  
4 Plaintiff’s difficulties “are due to acculturation issues, inability to speak English, and lack of social  
5 support” (*id.*). Drs. Peterson and Nelson agreed that Plaintiff suffered from depression, but also  
6 agreed that she should be capable of performing simple work within the limits of a workplace.  
7 (Tr. 23.) These opinions in the record are sufficient to constitute “such relevant evidence as a  
8 reasonable mind might accept as adequate to support” ALJ Nichols’s conclusion that Plaintiff is  
9 capable of performing sedentary unskilled work. Accordingly, ALJ Nichols’s findings that  
10 Plaintiff’s RFC is “sedentary” and that her “MRFC” is unskilled” should be affirmed.

#### 11 VII. CONCLUSION

12 The Commissioner’s determination to deny Plaintiff’s application for SSI benefits is  
13 supported by substantial evidence and is free of legal error. Based on the record evidence, the  
14 undersigned recommends that the Commissioner’s decision be AFFIRMED. A proposed Order  
15 accompanies this Report and Recommendation.

16 DATED this 5<sup>th</sup> day of May, 2006.

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18 MONICA J. BENTON  
19 United States Magistrate Judge  
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